LIBRARY
COURT, U. S.

FILED
MAR 15 1976
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-1319

FRANK E. HADDAD, JR. - - - Petitioner

vs.

UNITED STATES OF AMERICA - - Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

FRANK A. LOGAN
504 Kentucky Home Life Building
Louisville, Kentucky 40202
Counsel for Petitioner

March 11, 1976

WESTERFIELD-BONTE CO., 619 W. KENTUCKY—P.O. BOX 3231, LOUISVILLE, KY.

INDEX

	PAGE
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Constitutional Provisions and Statutory Provisions Involved	3– 4
Statement of Facts	4– 7
Reasons for Granting the Writ	7–26
Conclusion	27
Appendix A (Opinion of Sixth Circuit Court of Appeals)	29–33
Appendix B (Opinion of District Court, Western District of Kentucky)	34–42
Appendix C (Internal Revenue Service Summons)	43–44
Appendix D (Petitioner's Response to Petition to Enforce Internal Revenue Service Summons)	44–45
Appendix E (Order Staying Mandate, Sixth Circuit Court of Appeals)	46

AUTHORITIES

Cases:

	PAGE
Avery v. *Alabama*, 308 U. S. 444	16, 18
Baird v. *Koerner*, 279 F. 2d 623	19
Chandler v. *Fretag*, 348 U. S. 3	18
Couch v. *United States*, 409 U. S. 322	12, 14
Escobedo v. *Illinois*, 378 U. S. 478	26
Glasser v. *United States*, 315 U. S. 60	13, 17, 23–24
Hawk v. *Olson*, 326 U. S. 271	17
In re Grand Jury Proceedings, United States v. *Jones*, 517 F. 2d 666	10, 18
Johnson v. *Zerbst*, 304 U. S. 458	17
Katz v. *United States*, 389 U. S. 347	14
Lefkowitz v. *Turley*, 414 U. S. 70	11, 22, 26
Maness v. *Meyers*, 419 U. S. 449	10, 22
McCarthy v. *Arndstein*, 266 U. S. 34	11
Parker v. *United States*, 358 F. 2d 50, certiorari denied, 386 U. S. 916	25
Powell v. *Alabama*, 287 U. S. 45	12, 17
Reisman v. *Caplin*, 375 U. S. 440	9
Roe v. *Wade*, 410 U. S. 113	16
Russo v. *Byrne*, 409 U. S. 1219	23
Sinclair v. *United States*, 279 U. S. 263	15
United States v. *Ash*, 413 U. S. 300	17, 23
United States v. *Crockett*, 506 F. 2d 759, U. S. App. Pending	13
United States v. *Cutter*, 374 F. Supp. 1065	14
United States ex rel. Hart v. *Davenport*, 478 F. 2d 203	24
United States v. *Judson*, 322 F. 2d 460	11
United States v. *Kasmir*, 499 F. 2d 444, certiorari granted, 420 U. S. 906	12, 14
United States v. *Rosner*, 485 F. 2d 1213, certiorari denied, 417 U. S. 950	25

BLEED THROUGH

Constitutional Provisions:

PAGE

United States Constitution:

Fourth Amendment. 13, 14, 15, 16

Fifth Amendment. 6, 8, 10, 11, 12, 14, 16, 21

Sixth Amendment . . . . . *passim*

Statutes:

Federal Statutes:

26 U.S.C. 7602. . . . . 3, 5

26 U.S.C. 7604. . . . . 2, 4, 8–9, 14

Kentucky Statute:

Kentucky Revised Statute 421.210(4). 8

Miscellaneous:

American Bar Association, Canon 4. . . . . 8, 20

American Bar Association, Ethical Consideration 4-1. . . . . 8, 20

American Bar Association, Disciplinary Rule 4-101. 8, 20

Tarlow, "Witness for the Prosecution—A New Role for the Defense Lawyer," Journal of Criminal Defense I.331 (1975). 22

BLEED THROUGH

SUPREME COURT OF THE UNITED STATES

IN THE

October Term, 1975

No. _____

FRANK E. HADDAD, JR. - - - - *Petitioner*

v.

UNITED STATES OF AMERICA - - *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Petitioner, FRANK E. HADDAD, JR., prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Sixth Circuit, entered in this proceeding on December 10, 1975.

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix A) is reported at —— F. 2d ——. The Memorandum Opinion of the District Court for the Western District of Kentucky (Appendix B) is not reported.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on December 10, 1975 (Appendix A). An Order Staying Mandate was entered on March 2, 1976 (Appendix E). This petition for certiorari is filed within the thirty days from March 2, 1976, allowed by that Order. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

The District Court entered an order, pursuant to 26 U.S.C. § 7604(b), enforcing a summons against the Petitioner, an attorney, ordering the attorney to reveal fee information which might tend to incriminate his client as evidence of tax evasion. This order was affirmed by the Sixth Circuit Court of Appeals. The questions thereby arising are:

1. Is the Sixth Amendment right to effective assistance of counsel denied where full communication between attorney and client is impaired and inhibited by forcing the attorney to disclose the amount of fees paid to the attorney for defending the client in successive prosecutions, when such forced disclosure may be potentially incriminating as proof of the client's tax evasion and when immunity has not been granted?

2. Does forcing counsel to disclose potentially incriminating information concerning his fee arrangement with the client violate the client's Sixth Amendment right to effective counsel by impairing and inhibiting full communication between attorney and client where immunity has not been granted?

BLEED THROUGH

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the Constitution of the United States provides in pertinent part as follows:

> "In all criminal prosecutions the accused shall enjoy . . . the assistance of counsel for his defense."

The statute enabling the Internal Revenue Service to summons Petitioner's records, 26 U.S.C. § 7602, reads in pertinent part as follows:

> For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized—
>
> . . . . . .
>
> (2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry . . . .

The statute authorizing the District Court to enforce the Internal Revenue Service summons, 26 U.S.C. § 7604, reads in pertinent part as follows:

> (b) Enforcement.—Whenever any person summoned under section . . . 7602 neglects or refuses to obey such summons, or to produce books, papers, records, or other data, or to give testimony, as required, the Secretary or his delegate may apply to the judge of the district court or to a United States commissioner for the district within which the person so summoned resides or is found for an attachment against him as for a contempt. It shall be the duty of the judge or commissioner to hear the application, and, if satisfactory proof is made, to issue an attachment, directed to some proper officer, for the arrest of such person, and upon his being brought before him to proceed to a hearing of the case; and upon such hearing the judge or the United States commissioner shall have power to make such order as he shall deem proper, not inconsistent with the law for the punishment of contempts, to enforce obedience to the requirements of the summons and to punish such person for his default or disobedience.

STATEMENT OF FACTS

The Petitioner, FRANK E. HADDAD, JR., is an attorney practicing in Louisville, Kentucky. Petitioner represented one Ray Palmer in successive criminal actions, involving Federal charges, beginning in 1971. As part of this representative relationship, the client Palmer agreed to pay Petitioner attorney's fees.

BLEED THROUGH

In June, 1974, Petitioner was notified that the Internal Revenue Service was investigating his client Palmer's income tax liability for the years 1970 through 1972. The Internal Revenue Service requested that Petitioner furnish detailed information concerning legal fees paid to Petitioner by his client Palmer.

Because the Internal Revenue Service had not obtained a release from client Palmer of the attorney-client privilege, Petitioner refused to disclose the requested information.

On August 29, 1974, Special Agent Joseph H. Romine of the Intelligence Division of the Internal Revenue Service issued a summons, pursuant to 26 U.S.C. §7602(2), to Petitioner demanding production of Petitioner's records pertaining to fees paid by or on behalf of client Palmer, and directing Petitioner to appear before the Special Agent, (Internal Revenue Service Summons, Appendix C, *infra*).

Specifically, the summons directed Petitioner to produce for inspection records reflecting attorney's fees paid to Petitioner by client Palmer on his own behalf, by others on behalf of client Palmer, or by client Palmer on behalf of others, for the years 1970, 1971 and 1972. The summons stated that the information sought should reflect the "dates, amounts, and the medium of exchange" used to pay the Petitioner's fees. Petitioner also was directed to produce records reflecting the amounts owed by client Palmer at the close of each of the three tax years under investigation.

Petitioner appeared as directed but elected not to disclose the requested information. The Government

then filed a Petition in District Court to enforce the Summons.

Petitioner filed a response to the Government's Petition, stating various reasons for his election not to disclose the requested information: his ethical duty to await judicial determination as to disclosure; the summons is a fishing expedition to gather potentially incriminating evidence for a subsequent criminal proceeding; the Internal Revenue Service should state its purpose for requesting the information; the attorney-client privilege protects against disclosure of this information and the attorney has an obligation to assert his client's Fifth Amendment privilege against incrimination (Response to Petition to Enforce Internal Revenue Service Summons, Appendix D, *infra.*)

A hearing regarding the Petition to enforce the summons was held in District Court on October 22, 1974. At the hearing, Special Agent Romine stated that the Internal Revenue Service investigation was incomplete and that the information sought by the summons was necessary to determine the correct tax liability of Petitioner's client (T.E., p. 23).

To date, the Intelligence Division of the Internal Revenue Service has not instituted criminal charges against Petitioner's client Palmer.

In a Memorandum Opinion, entered December 16, 1974, the District Court ordered the Petitioner to "produce himself and the records sought." (Memorandum Opinion, Appendix B, *infra.*)

BLEED THROUGH

Petitioner appealed to the Sixth Circuit Court of Appeals. The Sixth Circuit permitted The National Association of Criminal Defense Lawyers to file a brief as *amicus curiae* with the Court, on behalf of Petitioner. The Sixth Circuit affirmed the District Court's decision in an opinion entered on December 10, 1975. (Sixth Circuit Opinion, Appendix A, *infra.*)

Petitioner brings this Petition to protect his client's Sixth Amendment right to effective counsel.

REASONS FOR GRANTING THE WRIT

Counsel states his reasons for granting the writ by carefully delineating the questions presented. First, counsel briefly runs through the various theories which have been postulated to protect free and full communication between the attorney and his client. (Part I) Second, counsel sets forth the reasons why the writ should be granted in this case. (Part II)

PART I: Absent Declaration by This Court, Various Stop-Gap Theories Have Been Adopted by the Courts on the Question of Whether the Sixth Amendment Protects Free and Full Communication Between Attorney and Client Against Impairment and Inhibition.

The problem is that the United States Supreme Court has never held that free and full communication between attorney and client is protected by the Sixth Amendment and shall not be impaired or inhibited. In the absence of such a holding, Courts on every level have adopted stop-gap measures in an effort to protect free and full communication between attorney and client. These stop-gap measures are named: At-

torney-Client Privilege, including American Bar Association promulgations; attorney's vicarious assertion of client's Fifth Amendment right against self-incrimination; application of client's Sixth Amendment choice-of-counsel guarantee; application of client's Fourth Amendment sphere-of-privacy guarantee; client's personal privacy zone.

In these days, when prosecutors and taxing authorities are more and more demanding that attorneys become witnesses against their own clients, it is appropriate and necessary for this Court to declare that the Sixth Amendment right to effective assistance of counsel guarantees free and full communication between attorney and client which shall not be impaired or inhibited.

A. The Attorney-Client Privilege has been postulated to protect free and full communication between attorney and client. The authorities illustrate that this is so.

Kentucky Revised Statute 421.210(4) provides in part:

> No attorney shall testify concerning a comunication made to him, in his professional character, by his client, or his advice thereon, without the client's consent. . . .

Accord, American Bar Association, "Code of Professional Responsibility and Canons of Judicial Ethics," Canon 4, Ethical Consideration 4-1, Disciplinary Rule 4-101.

Interpreting Section 7604(b) of the Internal Revenue Code, the United States Supreme Court has stated:

BLEED THROUGH

> Furthermore, we hold that in any of these procedures before either the district judge or United States Commissioner, the witness may challenge the summons on any appropriate ground. This would include, as the circuits have held, the defenses that the material is sought for the improper purpose of obtaining evidence for use in a criminal prosecution [citation omitted], as well as that it is protected by the attorney-client privilege [citation omitted]. . . . And this would be true whether the contempt be of a civil or criminal nature [citation omitted]. *Reisman* v. *Caplin*, 375 U. S. 440, 449 (1964).

The Fifth Circuit Court of Appeals has recently refused to force an attorney to disclose information arising during the establishment of the attorney-client relation, potentially incriminating to the client, on grounds of the attorney-client privilege. The Fifth Circuit stated:

> The purpose of the privilege would be undermined if people were required to confide in lawyers at the peril of compulsory disclosure every time the government decided to subpoena attorneys it believed represented particular suspected individuals. Just as the client's verbal communications are protected, it follows that other information, not normally privileged, should also be protected when . . . additional disclosures would yield substantially probative links in an existing chain of inculpatory events or transactions. The client may reasonably expect the lawyer to maintain silence in such circumstances, for disclosure could drastically diminish the value of legal discussions

> or planning that took place previously, or at least alter the course of subsequent strategy. *In re Grand Jury Proceedings, United States* v. *Jones,* 517 F. 2d 666, 674 (1975).

However, the Petitioner does not here raise the question presented on Attorney-Client Privilege grounds.

B. The Fifth Amendment has been construed to protect free and full communication between attorney and client. The authorities illustrate that this is so.

The United States Supreme Court has repeatedly held that the Fifth Amendment privilege against self-incrimination can be asserted in *any* proceeding wherever the disclosure may potentially incriminate an individual.

> In Kastigar v. United States, 406 U. S. 441, 32 L. Ed. 2d 212, 92 S. Ct. 1653 (1972), we recently reaffirmed the principle that the privilege against self-incrimination can be asserted "in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory." [numerous citations omitted] *Maness* v. *Meyers,* 419 U. S. 449, ——, 42 L. Ed. 2d 574, 587 (1975).
>
> The protection does not merely encompass evidence which may lead to criminal conviction, but includes information which would furnish a link in the chain of evidence that could lead to prosecution, as well as evidence which an individual reasonably believes could be used against him in a criminal prosecution. Hoffman v. United States, 341 U. S. 479, 486, 95 L. Ed. 1118, 71 S. Ct. 814 (1951). *Maness* v. *Meyers, supra,* 419 U. S. at ——, 42 L. Ed. 2d at 585.

BLEED THROUGH

Accord, McCarthy v. *Arndstein,* 266 U. S. 34, 40 (1924); *Lefkowitz* v. *Turley,* 414 U. S. 70, 77 (1973).

The Ninth and Fifth Circuit Courts of Appeal have held that, because of the unique relationship between counsel and client, an attorney may assert his client's Fifth Amendment privilege. The reasoning of these Courts makes sense. The Ninth Circuit stated:

> An attorney is his client's advocate. His function is to raise all the just and meritorious defenses his client has. No other "third party," nor "agent," nor "representative" stands in such a unique relationship between the accused and the judicial process as does his attorney. He is the only person besides the client himself who is permitted to prepare and conduct the defense of the matter under investigation. The attorney and his client are so identical with respect to the function of the evidence and to the proceedings which call for its production that any distinction is mere sophistry. *United States* v. *Judson,* 322 F. 2d 460, 467 (9th Cir. 1963).

The Fifth Circuit stated:

> We conclude that the taxpayer here retained a legitimate expectation of privacy with regard to the materials he placed in his attorney's custody, that he retained constructive possession of the evidence, and thus that he retained Fifth Amendment protection. As a matter of constitutional law, we can see no other way to resolve the apparent dilemma in a manner which is consistent with the nature of the right against self-incrimination and

> in furtherance of the interests it was designed to protect.
>
> . . . . . .
>
> [A]n attorney may claim the Self-Incrimination Privilege on behalf of his client if his client could have successfully asserted such a privilege. [numerous citations omitted] *United States* v. *Kasmir,* 499 F. 2d 444, 452, 453 (5th Cir. 1974), cert. granted, 420 U. S. 906 (1975).

The opinion of this Court in *Couch* v. *United States,* 409 U. S. 322 (1973), indicated that such a determination may indeed be correct. This Court stated:

> Yet situations may well arise where constructive possession is so clear . . . as to leave the personal compulsions upon the accused substantially intact. *Couch, supra,* 409 U. S. at 333.

However, the Petitioner does not here raise the question presented on Fifth Amendment grounds.

C. The Sixth Amendment choice-of-counsel right could be construed to protect free and full communication between attorney and client. The authorities illustrate that this is so.

The United States Supreme Court has repeatedly held that one of the essential parts of the Sixth Amendment right to effective assistance of counsel is the client's right to secure counsel of his own choice.

> It is hardly necessary to say that the right to counsel being conceded, a defendant should be afforded a fair opportunity to secure counsel of his own choice. *Powell* v. *Alabama,* 287 U. S. 45, 53 (1932).

BLEED THROUGH

Followed in *Glasser* v. *United States,* 315 U. S. 60, 70 (1942).

It would seem manifestly unfair that a client could select his attorney only to observe the Government force his chosen counsel to withdraw. When the Government compels the attorney to provide evidence to the prosecution against his client, then the attorney should decline to represent the client.

> [W]e feel compelled to comment on the [attorney's] failure to withdraw from the case when he realized that he was to be a prosecution witness. . . . As in all areas of legal practice, appearance can be as damaging as reality, and here the appearance of impropriety is overwhelming. *United States* v. *Crockett,* 506 F. 2d 759, 761 (5th Cir. 1975), U. S. App. Pending.

By placing the attorney in a position in which, as a potential source of prosecution evidence, he is unable to effectively represent the client, the Internal Revenue Service has dramatically interfered with the clients' Constitutional right to counsel of his own choice.

However, the Petitioner does not here raise the question presented on Sixth Amendment choice-of-counsel grounds.

D. The Fourth Amendment could be construed to protect the free and full communciation between attorney and client. The authorities illustrate that this is so.

The United States Supreme Court has stated that the Fourth and Fifth Amendments involve aspects of

a person's right to develop for himself a sphere of personal privacy.

> What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. [citations omitted] But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected. [citations omitted] *Katz* v. *United States,* 389 U. S. 347, 351-352 (1967).

Cf., Mr. Justice Marshall's dissent in *Couch* v. *United States,* 409 U. S. 322, 349-350 (1973), noting the need for developing criteria for determining whether evidence sought by the Government lies within the sphere of activities that a person attempts to keep private.

The United States District Court for the Western District of North Carolina has recently determined that a client's Fourth Amendment expectation of protected privacy in an attorney-client relation is the crucial factor in upholding Fifth Amendment protection.

Interpreting Section 7604(b) of the Internal Revenue Code, the District Court stated:

> Ownership of the property sought is not the fundamental criterion for Fifth Amendment immunity. Rather, under *Couch,* the crucial factor is the citizen's Fourth Amendment expectation of protected privacy or confidentiality of communications between him and his lawyer. *United States* v. *Cutter,* 374 F. Supp. 1065, 1067 (W.D. N.C. 1974).

Accord, United States v. *Kasmir,* 499 F. 2d 444, 453-454 (5th Cir. 1974), cert. granted, 420 U. S. 906 (1975).

BLEED THROUGH

However, the Petitioner does not here raise the question presented on Fourth Amendment grounds.

E. The Constitutional right of personal privacy could be construed to protect free and full communication between attorney and client. The authorities illustrate that this is so.

In *Sinclair* v. *United States,* 279 U. S. 263 (1929), this Court stated:

> It has always been recognized in this country, and it is well to remember, that few, if any, of the rights of the people guarded by fundamental law are of greater importance to their happiness and safety than the right to be exempt from all unauthorized, arbitrary or unreasonable inquiries and disclosures in respect of their personal and private affairs. *Sinclair, supra,* 279 U. S. at 292.

This Court has more recently recognized that a guarantee of certain areas or zones of privacy exists under the Constitution.

> [T]he Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution. In varying contexts, the Court, or individual Justices have, indeed, found at least the roots of that right in the First Amendement . . . in the Fourth and Fifth Amendments . . . in the penumbras of the Bill of Rights . . . in the Ninth Amendment . . . or in the concept of liberty guaranteed by the first section of the Fourteenth Amendment. . . . These decisions make it clear that only personal rights that can be deemed "fundamental" or "implicit in the concept of ordered liberty" . . . are included in

> this guarantee of personal privacy. [Numerous citations omitted throughout] *Roe* v. *Wade,* 410 U. S. 113, 152 (1973).

No personal right is more obviously "fundamental" or "implicit in the concept of ordered liberty" than the right to counsel.

However, the Petitioner does not here raise the question presented on personal privacy grounds.

PART II: This Court Should Declare That the Sixth Amendment Protects Free and Full Communication Between Attorney and Client Against Impairment and Inhibition.

The question presented focuses upon Sixth Amendment grounds. Petitioner respectfully submits that the foregoing grounds (attorney-client privilege, Fifth Amendment, Sixth Amendment choice-of-counsel, Fourth Amendment, personal privacy) sufficiently compel the result sought herein by Petitioner, and that these grounds separately and together adhere to and strengthen the Sixth Amendment stance adopted by this Petition.

Therefore, on the basis of the grounds heretofore set forth and on the basis of the Sixth Amendment ground set forth as follows, it is respectfully submitted that a writ should be granted in the present case.

> [W]here denial of the constitutional right to assistance of counsel is asserted, its peculiar sacredness demands that we scrupulously review the record. Mr. Justice Black in *Avery* v. *Alabama,* 308 U. S. 444, 447 (1940).

BLEED THROUGH

The Constitution has committed us to an adversary system for the administration of criminal justice. An essential element of the adversary system is the right to counsel. The Sixth Amendment to the Constitution guarantees the availability of the "assistance of counsel." The concept of a right to counsel is one of the most significant manifestations of our regard for the dignity of the individual.

> The purpose of the constitutional guaranty of a right to Counsel is to protect an accused from conviction resulting from his own ignorance of his legal and constitutional rights . . . *Johnson* v. *Zerbst,* 304 U. S. 458, 465 (1938).
>
> The function of counsel as guide through complex legal technicalities long has been recognized by this Court. *United States* v. *Ash,* 413 U. S. 300, 307 (1973).

It is axiomatic in the United States that the right to "assistance of counsel" means the right to effective "assistance of counsel." *Powell* v. *Alabama,* 287 U. S. 45, 58 (1932); *Glasser* v. *United States,* 315 U. S. 60, 70 (1942); *Hawk* v. *Olson,* 326 U. S. 271, 276 (1945).

Furthermore, the attorney can serve effectively as advocate only if he knows all that his client knows concerning the facts of the case. In other words, the right to *effective* "assistance of counsel" is meaningless if the client is not able to communicate freely and fully with the attorney. The United States Supreme Court has previously adverted to this.

> But the denial of opportunity for appointed counsel to confer, to consult with the accused and

> to prepare his defense, could convert the appointment of counsel into a sham and nothing more than a formal compliance with the Constitution's requirement that an accused be given the assistance of counsel. The Constitution's guaranty of assistance of counsel cannot be satisfied by mere formal appointment. *Avery* v. *Alabama*, 308 U. S. 444, 446 (1940).

Accord, *Chandler* v. *Fretag*, 348 U. S. 3, 10 (1954).

One practical aspect of the recognition that full and free communication between client and attorney is fundamental to the effective assistance of counsel is the wide acceptance of the attorney-client privilege. Another practical aspect of the recognition that full and free communication between client and attorney is fundamental to the effective assistance of counsel is embodied in the canons, ethical considerations, and disciplinary rules adopted by this nation's legal profession.

The wide acceptance of the attorney-client privilege is evident from many authorities. The Fifth Circuit has stated:

> [The attorney-client privilege] is a creature of public policy calculated to encourage people to seek legal advice on the basis of frank, useful communications. The purpose of the privilege would be undermined if people were required to confide in lawyers at the peril of compulsory disclosure every time the government decided to subpoena attorneys it believed represented particular suspected individuals. *In re Grand Jury Proceedings, United States* v. *Jones*, 517 F. 2d 666, 674 (5th Cir. 1975).

BLEED THROUGH

The Ninth Circuit has stated:

> The doctrine is based on public policy. While it is the great purpose of law to ascertain the truth, there is the countervailing necessity of insuring the right of every person to freely and fully confer and confide in one having knowledge of the law, and skilled in its practice, in order that the former may have adequate advice and a proper defense. This assistance can be made safely and readily available only when the client is free from the consequences of apprehension of disclosure by reason of the subsequent statements of the skilled lawyer. *Baird* v. *Koerner*, 279 F. 2d 623, 629-630 (9th Cir. 1960).

The attorney-client privilege, "a creature of public policy," has been widely accepted to protect full and free communication between attorney and client because this Court has not yet declared that full and free communication between attorney and client is an essential part of the right to effective assistance of counsel.

Full and free communication between attorney and client *is* an essential part of the right to effective assistance of counsel, and it should not be impaired or inhibited by forcing the attorney to disclose potentially incriminating information developed during that free and full communication, as the Government hopes to accomplish in the instant case.

This nation's legal profession has likewise attempted to protect full and free communication between attorney and client, by promulgating canons,

ethical considerations, and disciplinary rules. The American Bar Association's Canon 4 states:

> A Lawyer Should Preserve the Confidences and Secrets of a Client.

Ethical Consideration 4-1 states, in part:

> A lawyer should be fully informed of all the facts of the matter he is handling in order for his client to obtain the full advantage of our legal system . . . . The observance of the ethical obligation of a lawyer to hold inviolate the confidences and secrets of his client not only facilitates the full development of facts essential to proper representation of the client but also encourages laymen to seek early assistance.

Disciplinary Rule 4-101 implements Ethical Consideration 4-1 and Canon 4.

By adopting these statements and rules, the American Bar Association clearly seeks to protect full and free communication between attorney and client. The American Bar Association has had to adopt these statements and rules because this Court has not yet declared that full and free communication between attorney and client is an essential part of the Sixth Amendment's fundamental right to effective assistance of counsel.

Full and free communication between attorney and client *is* an essential part of the right to effective assistance of counsel, and it is adequately protected neither by an attorney-client privilege based on public policy nor by the legal profession's statements and rules. Full

and free communication between counsel and client as an essential part of the fundamental right to effective assistance of counsel requires Constitutional protection, which only this Court can provide.

This is especially true now, when prosecutors and taxing authorities are making new efforts to compel lawyers to produce evidence incriminating to their clients. These new efforts of prosecutors and taxing authorities threaten the very core and fiber of the Sixth Amendment right to counsel.

In the case at bar, the Internal Revenue Service has attempted to compel the attorney to disclose information potentially incriminating to the client, which information was developed during the establishment of the attorney-client relation. The District Court and the Sixth Circuit have held that the Internal Revenue Service may thus compel this attorney to become a source of potentially incriminating information against his own client.

Clearly, the Internal Revenue Service could not obtain directly from the client what it here attempts to obtain indirectly from the client's attorney: the amount of fees paid to the attorney for defending successive criminal prosecutions. The amount of fees paid to the attorney might be potentially incriminating as proof of the client's tax evasion, so that the client could assert his Fifth Amendment privilege against self-incrimination.

> The Amendment not only protects the individual against being involuntarily called as a witness against himself in a criminal prosecution but also privileges him not to answer official questions put

> to him in any other proceeding, civil or criminal, formal or informal, where the answers *might tend to incriminate him in future criminal proceedings.* [Emphasis added.] *Lefkowitz* v. *Turley,* 414 U. S. 70, 77 (1973).

Followed in *Maness* v. *Meyers,* 419 U. S. 449, ——, 42 L. Ed. 2d 574, 587 (1975). In the present case, the client's disclosure of the amount of fees he paid to his attorney to defend him in successive criminal prosecutions "might tend to incriminate him" in a future prosecution for tax evasion.

In the present case, the Internal Revenue Service is unable to directly compel this fee information from the client so it is attempting to indirectly compel this information from the attorney.

A recent law journal article has capsualized the impact of such compulsion.

> Questioning an attorney about information he learned from his client, even information exchanged at the threshold of their relationship, would seriously endanger the delicate aura of trust and confidence which lies at the heart of the attorney-client relationship . . . .
>
> More than trust or confidence is at stake. . . . As potential clients learn that incriminating information they might provide to attorneys is available to prosecuting authorities, they may refrain from exercising their constitutional rights to assistance of counsel. Tarlow, "Witness for the Prosecution—A New Role for the Defense Lawyer," *Journal of Criminal Defense* I:331, 363 (1975).

Petitioner respectfully submits that the taxing authorities possess sufficient means and resources to incriminate suspected individuals without forcing attorneys to provide less than effective assistance of counsel.

This Court has recently stated that the Sixth Amendment's counsel guarantee provides an equalizing effect, reflecting

> a desire to minimize the imbalance in the adversary system that otherwise resulted with the creation of a professional prosecuting official. *United States* v. *Ash*, 413 U. S. 300, 309 (1973).

How can the defense attorney cope with the vast resources of "a professional prosecuting official" if the defense attorney is required to disclose information potentially incriminating to his own client? The Sixth Amendment right to counsel must require the right to keep such information from the Government. The authorities illustrate that this is so.

> [T]he right to counsel guaranteed by the Sixth Amendment . . . obviously involves the right to keep the confidences of the client from the ear of the Government. Mr. Justice Douglas as Circuit Justice, *Russo* v. *Byrne*, 409 U. S. 1219, 1221 (1972).

Enforcement of the instant summons would deny "the right to keep the confidences of the client from the ear of the Government."

In *Glasser* v. *United States*, 315 U. S. 60 (1942), this Court specifically re-affirmed that the Sixth Amend-

ment right to counsel is impaired by requiring one lawyer to simultaneously represent conflicting interests.

> [S]o are we clear that the "assistance of counsel" guaranteed by the Sixth Amendment contemplates that such assistance be untrammeled and unimpaired by a court order requiring that one lawyer shall simultaneously represent conflicting interests. If the right to the assistance of counsel means less than this, a valued constitutional safeguard is substantially impaired. *Glasser, supra,* 315 U. S. at 70.

The same principle applies to the case at bar. If counsel representing a client is forced by court order to provide information potentially incriminating to that client, then "a valued constitutional safeguard is substantially impaired."

The Circuit Courts of Appeal are likewise clear that the Sixth Amendment right to effective assistance of counsel must include assistance which is unimpaired by forced disclosure of communications between attorney and client.

The Third Circuit has stated:

> The right to counsel guaranteed by the sixth and fourteenth amendments contemplates the service of an attorney devoted solely to the interests of his client. *United States ex rel. Hart* v. *Davenport,* 478 F. 2d 203, 209 (3d Cir. 1973).

The obviously proper posture for an attorney is to be "devoted solely to the interests of his client." Neither

BLEED THROUGH

the prosecutor nor the taxing authorities should be aided in impairing full and free communication between attorney and client.

The Seventh Circuit has stated:

> There can be no question about the right to the effective assistance of counsel, or that this right includes the right of unfettered communication between attorney and client. *Parker* v. *United States,* 358 F. 2d 50, 53 (7th Cir. 1965), cert den. 386 U. S. 916 (1967).

The Second Circuit has stated:

> [T]he essence of the Sixth Amendment right is, indeed, privacy of communication with counsel. *United States* v. *Rosner,* 485 F. 2d 1213, 1224 (1973), cert. den. 417 U. S. 950 (1974).

The Internal Revenue Service seeks to breach the present privacy of the client's communication with counsel in violation of the "essence of the Sixth Amendment right." If the Internal Revenue Service is successful in forcing disclosure in the present instance, two fundamentally improper effects will occur in violation of the Sixth Amendment. First, an immediate breach in the privacy of communications between attorney and client will occur. And second, the future confidence of the client in committing his affairs to his attorney's knowledge will be critically undermined. Both effects contravene full and free communication between attorney and client which is fundamental to the effective assistance of counsel guaranteed by the Sixth Amendment.

In the United States, no individual should be required to forfeit other Constitutional rights because he has exercised his Sixth Amendment right to the effective assistance of counsel. The prescient words of *Escobedo* articulate the lesson of history applicable to the present case.

> [N]o system of criminal justice can, or should, survive if it comes to depend for its continued effectiveness on the citizens' abdication through unawarenes of their constitutional rights. No system worth preserving should have to *fear* that if an accused is permitted to consult with a lawyer, he will become aware of, and exercise, these rights. *If the exercise of constitutional rights will thwart the effectiveness of a system of law enforcement, then there is something very wrong with that system.* [Emphasis added] *Escobedo* v. *Illinois,* 378 U. S. 478, 490 (1964).

There is something "very wrong" with encouraging attempts by taxing authorities and prosecutors to force an attorney to disclose information potentially incriminating to his client developed during the establishment of the attorney-client relation, where immunity has not been granted. The exercise of the Constitutional guarantee ought not be subordinate to the law enforcement function.

The remedy of the Government in the present case is to grant immunity to the client, *Lefkowitz* v. *Turley,* 414 U. S. 70, 77 (1973), not to force the attorney to become a witness against his own client, in violation of the client's Sixth Amendment right to effective assistance of counsel.

BLEED THROUGH

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

FRANK A. LOGAN
504 Kentucky Home Life Building
Louisville, Kentucky 40202

Counsel for Petitioner

APPENDIX

APPENDIX

APPENDIX A

No. 75-1351

UNITED STATES COURT OF APPEALS
For the Sixth Circuit

UNITED STATES OF AMERICA, *Petitioner-Appellee,* v. FRANK E. HADDAD, JR., *Respondent-Appellant.*	ON APPEAL from the United States District Court for the Western District of Kentucky.

Decided and Filed December 10, 1975.

Before: WEICK, MILLER and ENGEL, Circuit Judges.

MILLER, Circuit Judge. This is an appeal from an order of the district court, Western District of Kentucky, enforcing a summons issued pursuant to 26 U.S.C. Sec. 706, *et seq.* by an agent of the Internal Revenue Service ("IRS").

The appellant ("Haddad"), an attorney, had represented one Ray Palmer and others in a criminal case in 1971. After the conclusion of the criminal case, IRS issued a tax assessment for excise taxes allegedly due from Palmer. Haddad also represented Palmer in the excise tax matter.

In June 1974, IRS notified Haddad that the income tax liability of Palmer for the years 1970 through 1972 was being investigated and requested that Haddad furnish information concerning legal fees received by Haddad from

Palmer. Haddad refused to comply with the request unless IRS obtained a release from Palmer of the attorney-client privilege. Palmer subsequently refused to waive the privilege.

On August 29, 1974, IRS agent Joseph H. Romine issued a summons to Haddad requiring production of Haddad's records pertaining to fees paid by or on behalf of Palmer and directing Haddad to appear before Romine.[1] Haddad appeared as directed but refused to comply further with the summons. The government then filed a petition in district court to enforce the summons. A hearing on the petition was held on October 22, 1974, when Romine, the only witness, testified that he was an agent in the Intelligence Division of IRS and that he had issued the summons in furtherance of a joint investigation of Palmer by the Audit and Intelligence Divisions initiated by the Intelligence Division. Romine stated that the investigation was incomplete and that the information sought by the summons was necessary to determine the correct tax liability of Palmer. There has been no recommendation for criminal prosecution of Palmer, and Romine stated that a recommendation for disposition of the case cannot be made until the investigation is completed.

Since in this case there is no evidence of a lack of good faith on the part of IRS in the issuance of the summons, since no criminal prosecution has been recommended, and since there is present in the record convincing evidence that the sole purpose of the investigation was not for criminal

---

[1]Specifically, the summons directed Haddad to produce for inspection records reflecting attorneys' fees paid to Haddad by Palmer on his own behalf, by others on behalf of Palmer, or by Palmer on behalf of others, for the years 1970, 1971 and 1972. The summons stated that the information sought should reflect the dates, the amount and the medium of exchange used to pay the attorneys' fees. Haddad was also directed to produce records reflecting the amounts owed by Palmer at the close of each of the three years under investigation.

BLEED THROUGH

prosecution, under applicable and controlling authority the issuance of the summons was clearly proper. *Donaldson* v. *United States*, 400 U. S. 517 (1971); *United States* v. *Weingarden*, 473 F. 2d 454 (6th Cir. 1973).

Appellant argues that the district court erred in ruling that fees paid to an attorney by a client are not communications protected by the attorney-client privilege but are merely the consideration given by a client for obtaining the legal services of his attorney. In the absence of special circumstances, the amount of money paid or owed to an attorney by his client is generally not within the attorney-client privilege. *In re Michaelson*, 511 F. 2d 882, 888 (9th Cir.) *cert. denied*, ____ U. S. ____ (1975); see *In re Grand Jury Proceedings*, 517 F. 2d 666, 670-71 (5th Cir. 1975). The receipt of fees from a client is not usually within the privilege because the payment of a fee is not normally a matter of confidence or a communication. *United States* v. *Hodson*, 492 F. 2d 1175 (10th Cir. 1974). This Court has held that ministerial or clerical services of an attorney in transferring funds to or from a client is not a matter of confidence protected by the attorney-client privilege. *United States* v. *Bartone*, 400 F. 2d 459 (1968), *cert. denied*, 393 U. S. 1027 (1969).

Special circumstances, however, many justify an exception to the general rule. In *In re Grand Jury Proceedings, supra*, certain attorneys were held in contempt by the district court after refusing to disclose before a federal grand jury the identity of unknown third parties who might have furnished bond money or paid (or promised to pay) attorneys' fees for known clients. The amount of the bond and the fees were high in some cases, and the Court, in reversing the district court, found that the sole motive of the government in seeking such information was ". . . to corroborate or supplement already-existent incriminating information about persons suspected of income tax offenses. . . ."

Id. at 674. *See also Baird* v. *Koerner*, 279 F. 2d 623 (9th Cir. 1960); *Tillotson* v. *Boughner*, 350 F. 2d 663 (7th Cir. 1965). No such special circumstances exist in this case.

Appellant also argues that the district court erred in denying Haddad the right to assert the Fifth Amendment rights of his client Palmer. The Fifth Amendment privilege against self-incrimination has been characterized as a personal privilege. The privilege does not permit an attorney to plead that his client might be incriminated by his testimony. *United States* v. *Goldfarb*, 328 F. 2d 280 (6th Cir. 1964); *see United States* v. *Mayes*, 512 F. 2d 637, 649 6th Cir. 1975). In *Couch* v. *United States*, 409 U. S. 322 (1973), the Supreme Court stated at page 328:

> It is important to reiterate that the Fifth Amendment privilege is a *personal* privilege: it adheres basically to the person, not to information that may incriminate him. As Mr. Justice Holmes put it: "A party is privileged from producing the evidence but not from its production." *Johnson* v. *United States*, 228 U. S. 457, 458 (1913). The Constitution explicitly prohibits compelling an accused to bear witness "against himself"; it necessarily does not proscribe incriminating statements elicited from another. Compulsion upon the person asserting it is an important element of the privilege, and "prohibition of compelling a man . . . to be witness against himself is a prohibition of the use of physical or moral compulsion to extort communications from *him*," *Holt* v. *United States*, 218 U. S. 245, 252-253 (1910) (emphasis added). It is extortion of information from the accused himself that offends our sense of justice.

In this case, Haddad does not claim that the information sought by IRS would tend to incriminate *him*.

Even if it should be held that an attorney has standing to assert his client's Fifth Amendment privilege against self-incrimination, we would then have to decide whether the client himself is shielded by the Fifth Amendment from the compelled production of his attorney's records reflecting payment of attorneys' fees by or on behalf of the client. *See United States* v. *White*, 477 F. 2d 757, 762 (5th Cir. 1973), *aff'd en banc*, 487 F. 2d 1335 (5th Cir. 1973), *cert. denied*, 419 U. S. 872 (1974). In *White* the question was whether the Fifth Amendment shields an attorney's client from the compelled production from the attorney of workpapers owned and prepared by the client's accountant and held in the attorney's possession. The workpapers in question had never been in the actual possession of the client. In refusing to hold that the client was shielded by the Fifth Amendment, the Court in *White*, *supra* at 763, interpreted the Supreme Court's decision in Couch:

> The lesson to be drawn from *Couch*, then, is that unless the taxpayer is actually in possession of documents sought by the government—or clearly has constructive possession—he will be unable to seek the shelter of the fifth amendment because he will not be the object of any impermissible governmental compulsion.

We believe that the reasoning of the Court in *White* is directly applicable to the facts of this case.[2] The facts in this case do not establish possession on the part of the client, actual or constructive, sufficient to enable Palmer to invoke the shield of the Fifth Amendment.

Appellant's other contentions we deem to be without merit. The judgment of the district court is therefore

AFFIRMED.

---

[2]In *United States* v. *Kasmir*, 499 F. 2d 444 (5th Cir. 1974), *cert. granted*, 420 U. S. 906 (1975), the court arrived at a contrary conclusion where the taxpayer-client received the records from his accountant and then delivered them to his attorney.

APPENDIX B

In the
UNITED STATES DISTRICT COURT
For the Western District of Kentucky
At Louisville

Civil Action C 74-377

UNITED STATES OF AMERICA and
JOSEPH H. ROMINE, Special Agent of the Internal
Revenue Service - - - - - - *Petitioner*

v.

FRANK HADDAD, JR. - - - - - - *Respondent*

MEMORANDUM OPINION

This action is submitted to the Court for decision following the holding of an evidentiary hearing on October 22, 1974. On August 29, 1974, a summons was issued by the Internal Revenue Service to respondent Frank E. Haddad, Jr., an attorney at law, directing him to appear before Joseph H. Romine, an officer of the I.R.S. to give testimony relating to the tax liability of Ray Palmer for the years 1970, 1971 and 1972. Respondent was directed to bring with him client ledger cards or other records reflecting attorney fees paid to him by Palmer or others on his behalf, for the years in question, such records to reflect the dates, amounts and the medium of exchange used to pay the

attorney fees, and the amounts owed Mr. Haddad by Palmer as of December 31, 1969, December 31, 1970; December 31, 1971; and December 31, 1972.

On October 2, 1974, Romine executed an affidavit, the substance of which was that, although Haddad had appeared before him on September 10, 1974, he refused to comply with the summons issued on August 29th. The affidavit also stated that it was necessary to examine the papers demanded by the summons and to take testimony of Mr. Haddad in order to ascertain the correct tax liability of Palmer for the years in question. It was also stated that Romine was a Special Agent, employed in the Intelligence Division of I.R.S., and was conducting an investigation for the purposes of ascertaining the correct tax liability of Palmer.

On October 3, 1974, the petitioners filed their petition to enforce the I.R.S. summons and an order to show cause was issued, after which a response was filed on behalf of Mr. Haddad. The hearing was held in open court on October 22, 1974, and the only testimony introduced was that of Mr. Romine, who was called at the request of the respondent. Subsequently, lengthy and extensive briefs were filed by the parties.

The respondent alleged in his response four defenses: The first was that it was his duty to protect the information and to resist the divulging of the information until a judicial determination of his duty had been made. The second defense is that the summons was not issued in good faith, but as a general "fishing expedition." The third defense states that the petitioner should disclose whether the information in the records demanded by them is necessary to enable them to determine the correctness of Palmer's tax returns. The fourth defense asserted is that of an attorney-client privilege and of a Fifth Amendment privilege.

The first defense raised by the respondent causes no problems and actually is not intended as a substantive defense to the enforcement of the summons but merely as a legitimate device to obtain a ruling by the Court as to the duties imposed upon respondent in this situation.

The next contention made by the respondent as to the lack of good faith on the part of petitioners is without merit. *Donaldson* v. *United States,* 400 U. S. 517 (1971), holds that Congress has clearly authorized the use of the summons by the I.R.S. in investigating what may appear to be criminal conduct. It also holds that "[t]o draw a line where a special agent appears would require the Service, in a situation of suspected but undetermined fraud, to forego either the use of the summons or the potentiality of an ultimate recommendation for prosecution." See 400 U. S. at pp. 535 and 536.

Donaldson further indicates that unless a recommendation has been made for criminal prosecution, or a criminal prosecution has been instituted and is pending, the use of the summons is proper. It is not to be considered as an abuse of process unless the Government already has the testimony sought pursuant to the summons. Here, there is no showing that any recommendation has been made that Palmer be prosecuted in a criminal proceeding. The most that is shown is that there is a joint investigation being made by the Intelligence Division and the Audit Division of I.R.S. In this connection, an interesting footnote appears at p. 535 of *Donaldson,* stating that approximately one-half of the full-scale tax fraud investigations undertaken by the Intelligence Division resulted in recommendations for prosecution, and that in the cases where it was not recommended, approximately $20,000,000 in deficiencies and penalties resulted.

Coming now to respondent's contentions that an attorney-client privilege exists with regards to the information

sought by the petitioners, the great weight of authority is to the contrary. See *Colton* v. *United States,* 306 F. 2d 633 (2nd Cir. 1962) and *United States* v. *Cromer,* 483 F. 2d 99 (9th Cir. 1973). It is true that these two cases disagree as to whether federal law or state law should be resorted to in ascertaining whether or not the assertion of the privilege is proper, with the Second Circuit holding that federal law controls and the Ninth Circuit holding that state law controls.

Judge Mac Swinford, in an interesting opinion in the case of *United States* v. *Summe,* 208 F. Supp. 925 (E.D. Ky. 1962), held that the attorney-client privilege is derived from common law, and that federal courts recognize the attorney-client privilege in cases where they are not following the law of some other jurisdiction. Judge Swinford then went on to state that since the federal common law recognizes the attorney-client privilege, it seems unnecessary to solve any choice of law problem. He then held that there was no privilege to the attorney to withhold from the Government's summons the books and records which he used belonging to the taxpayer in preparing the returns. Judge Swinford held that it was not proper to give the agent unlimited authority to examine the attorney, but after examining the questions propounded to him, he held that none of them was within the rule of admitting the privilege between the attorney and client except for one question.

In reaching his conclusions, Judge Swinford asserted the rule as to the attorney-client privilege to be as follows:

> "'(1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the com-

munication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion of law or (ii) legal services of (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client'."

Using these criteria, it is obvious that fees paid to the respondent by a client are not communications relating to a fact of which the attorney was informed by his client. They are merely the consideration given by a client for obtaining the legal services of his attorney and in no way are they privileged or confidential within the attorney-client privilege or relationship. See *United States* v. *Cromer,* supra, and *Colton* v. *United States,* supra.

Coming now to respondent's contention that the petitioners have failed to meet the standards set out in *United States* v. *Powell,* 379 U. S. 48 (1964), we find that at the evidentiary hearing Romine testified, p. 23, that the information which he sought in the summaries, in his opinion, was necessary to his investigation. On p. 25 he was asked whether this information was sought to determine the legality of a deduction which Mr. Palmer had made on his tax return, and he responded "it was not." However, no examination was made by respondent of Romine as to whether the information sought was already in the hands of the Government, and we believe it is a fair inference from his testimony that the information sought was necessary for the Government's use and that it was not already in the possession of the Government.

In *United States* v. *Powell,* supra, the Supreme Court upheld a contention of the I.R.S. that it was entitled to enforce its summons issued pursuant to 26 U.S.C. § 7602(2), and to require the president of a corporation to produce

records relating to the tax returns of the corporation of which he was president, even though the returns had been once briefly examined, and even though the three year statute of limitations had run. In that case, the respondent had appeared before the Service but contended that before he could be forced to produce the records, the Service had to indicate some grounds for its belief that a fraud had been committed. The agent refused to give such indication and the meeting terminated.

At the enforcement hearing held pursuant to 26 U.S.C. § 7604(b), the respondent again indicated his objection to producing the records and asked the Service to show some basis for its suspicion of fraud. The Service chose to stand on the petition and the agent's affidavit which was to the effect that he had been investigating the taxpayer's returns for 1958 and 1959, as to which the statute of limitations had expired, and that the Regional Commissioner had determined that an additional examination was necessary of those years, and that the agent had reason to suspect that the taxpayer had fraudulently falsified his 1958 and 1959 returns by overstating expenses.

The Supreme Court held "that the Government need make no showing of probable cause to suspect fraud unless the taxpayer raises a substantial question that judicial enforcement of the administrative summons would be an abusive use of the court's process, predicated on more than the fact of re-examination and the running of the statute of limitations on ordinary tax liability."

While the Supreme Court did state, on pp. 57 and 58, that the Commissioner must show that the investigation will be conducted pursuant to a legitimate purpose, that the information sought is not already within the Commissioner's possession and that the administrative steps required by the Code have been followed, subsequent language appearing on p. 58 indicates that the Court was concerned with an abuse of process, but that the burden of showing such an abuse is

on the taxpayer and is not met by a mere showing that the statute of limitations has run, or that the records in question have already been once examined.

In the case at bar, the most that the respondent has done is to raise a doubt as to whether or not the records sought to be examined, to wit: his own free records and other papers pertaining to his compensation from Palmer, are already in the possession of the United States. Since the respondent was present at the hearing and made no offer to the Court of proof to this effect, and since the I.R.S. agent testified that the information was necessary to his investigation, the Court concludes that the respondent had not met his burden of showing an abuse of the Court's process by the I.R.S.

Respondent, in this connection, places his reliance upon *United States* v. *Theodore*, 479 F. 2d 749 (4th Cir. 1973) and *United States* v. *Pritchard*, 438 F. 2d 969 (5th Cir. 1971). While there is language in those cases upholding respondent's position, it is to be noted that both are distinguishable from the case at bar. In *Pritchard* it was undisputed that the Service already had the information sought within its possession, and that the I.R.S. agent had looked at all copies of the taxpayer's papers in the accountant's file, and his investigation had lasted for several weeks. In *Theodore*, the information sought was copies of returns prepared by respondent for a large number of his clients. The Fourth Circuit was of the opinion that the burden upon the Commissioner was to demonstrate that the material requested was not within his possession or that, if technically within his possession, he had no practical way of obtaining the desired item, p. 755.

The Court believes that *Theodore* demonstrated an abuse of process which the taxpayer proved at the evidentiary hearing from testimony of its accountant. In *Theodore*, the court was concerned with the very broad scope of the matters sought to be inquired into by the Commis-

sioner, and we believe, for that reason, used language which placed the burden on the Commissioner to demonstrate freedom from abuse of process rather than upon the taxpayer to show abuse of process. In the event that *Theodore* is construed as placing the burden upon the Commissioner to show freedom from abuse of process, this Court respectfully disagrees and believes that, as is held in *United States* v. *Powell,* supra, the burden is upon the taxpayer to show abuse, which he has failed to do in this case.

Coming finally to the taxpayer's Fifth Amendment arguments and to his reliance upon *United States* v. *Kasmir,* 499 F. 2d 444 (5th Cir. 1974), both his argument and his reliance upon that case are without merit. In *Kasmir,* the taxpayer's attorney refused to comply with the I.R.S. summons because that summons required him to give up documents belonging to the taxpayer which had been turned over to his attorney, Kasmir. The Fifth Circuit phrased the issue presented in these words:

> ". . . whether the constitutional privilege against compulsory self-incrimination may be invoked in behalf of a taxpayer by his attorney to prevent the production of income tax workpapers in his attorney's possession. . . ."

The mere recitation of the above words and the analysis of the facts in *Kasmir* are sufficient to make obvious the lack of merit of the respondent's Fifth Amendment plea. Respondent has not been asked to produce any papers or documents which belong to his client, but merely to produce his own financial records and other papers that pertain to his compensation received from the taxpayer-client. Therefore, he has no Fifth Amendment claim at all to assert.

The respondent, in his brief, requests that he be allowed to take further discovery. He does not specify what he plans to establish by the taking of discovery, and the Court

is of the opinion that the evidentiary hearing taken in conjunction with Rule 81(a)(3), Federal Rules of Civil Procedure, warrant a denial of the discovery motion. In *United States* v. *Turner*, 480 F. 2d 272 (7th Cir. 1973), it is held that the in-court examination of the agents involved in summoning the names of an attorney's client is an acceptable alternative for complete discovery. See, also, *United States* v. *Bowman*, 435 F. 2d 467 (3rd Cir. 1970) and *United States* v. *Salter*, 432 F. 2d 697 (1st Cir. 1970), where the court held that broad discovery puts the I.R.S. under a severe handicap in conducting a civil investigation and can be expected to cause extensive delays and jeopardize the integrity and effectiveness of the investigation. The court there states that if, at the end of the evidentiary hearing, there remains a substantial question in the court's mind regarding the validity of the Government's purpose, it might then grant discovery.

Since, in the instant case, the respondent has not shown that the Government has abused its powers granted to it by 26 U.S.C. § 7602, has not shown that a criminal prosecution is pending, and has not shown bad faith or fraud or harassment on the part of the Government, nor any Fifth Amendment privilege available to respondent, nor an attorney-client privilege, it is the Court's opinion that the petitioner is entitled to the relief which it seeks, and that the respondent should produce himself and the records sought by the petitioner at a time to be set by the Revenue Service, provided that sufficient time shall be given to allow the respondent to petition this Court for a stay order should he desire to appeal to the Sixth Circuit.

Dated December 16, 1974

/s/ Charles M. Allen
Charles M. Allen
United States District Judge

cc: Counsel of Record
Entered December 16, 1974

APPENDIX C

SUMMONS

DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE

In the matter of the tax liability of
RAY PALMER

Internal Revenue District of Louisville
Period(s) 1970, 1971, 1972
The Commissioner of Internal Revenue

To FRANK E. HADDAD, JR., Attorney-at-Law
Kentucky Home Life Building

At Louisville, Ky. 40202

Greetings: You are hereby summoned and required to appear before JOSEPH H. ROMINE an officer of the Internal Revenue Service, to give testimony relating to the tax liability or the collection of the tax liability of the above named person for the period(s) designated and to bring with you and produce for examination the following books, records, and papers at the place and time hereinafter set forth:

The following records of FRANK E. HADDAD, JR., Attorney-at-Law:

Client ledger cards or other records which reflect attorney fees paid to you by PALMER or by others on his behalf for himself or others for the years 1970, 1971, and 1972. The records should reflect the dates, amounts, and the medium of exchange used to pay the attorney fees. The requested records should also reflect amounts owed you by PALMER as of December 31, 1969; December 31, 1970; December 31, 1971; and December 31, 1972.

Place and time for appearance:

at 5th Floor, P. O. Building, 6th & Broadway, 7th Street End, Louisville, KY 40201 on the 10th day of September, 1974 at 1:30 o'clock P.M.

Failure to comply with this summons will render you liable to proceedings in the district court of the United States or before a United States commissioner or magistrate to enforce obedience to the requirements of this summons, and to punish default or disobedience.

Issued under authority of the Internal Revenue Code this 29th day of August, 1974

Attested Copy /s/ Joseph H. Romine Special Agent

APPENDIX D

RESPONSE TO PETITION TO ENFORCE INTERNAL REVENUE SERVICE SUMMONS

Comes the Respondent, Frank E. Haddad, Jr., by counsel, and in response to Petition to Enforce Internal Revenue Service Summons, states:

1. That it is his ethical duty to protect the information sought to be obtained by the Petitioners and resists the divulging of the information sought until a judicial determination of his duty to make such disclosure has been made.

2. The summons was not issued in a good faith investigation of a tax liability of the Respondent's client, but it is an attempt for conducting a general fishing expedition to make possible an exploratory investigation, the purposes and limits of which can be determined only as the investigation proceeds, and at such time as the petitioners may decide to define it as a criminal investigation.

3. As a matter of fundamental fairness and in order to determine the relevancy of the information demanded to be produced by the respondent, the petitioners should disclose whether the testimony in the records demanded by them is necessary to enable the Petitioners to determine the correctness of Ray Palmer's tax return by a determination of whether the fees which Palmer has deducted on his return as fees paid to the Respondent were legitimate business expenses.

4. The attorney-client privilege exists for the benefit of the client, but the attorney has the duty upon any attempt to require him to testify or produce documents within the confidence, to make assertions of the privilege, not merely for the benefit of the client, but also as a matter of professional responsibility in preventing the policy of the law from being violated. The respondent has an obligation to assert his client's Fifth Amendment privilege to resist discovery of information that he holds which relates solely to his legal advice or services to his client.

WHEREFORE, the Respondent prays for this Court to enter an order:

1. Staying the enforcement of the summons;

2. That Petitioners, if they desire an evidentiary hearing on the contentions of Respondent, file a request to that effect by October 21, 1974.

3. For such other relief to which Respondent may appear entitled.

FRANK A. LOGAN
504 Ky. Home Life Bldg.
Louisville, Ky. 40202—584-6131
Attorney for Respondent

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
No. 75-1351

UNITED STATES OF AMERICA, ET AL. - *Petitioners-Appellees*

v.

FRANK E. HADDAD, JR. - - *Respondent-Appellant*

BEFORE: WEICK, MILLER and ENGEL, Circuit Judges.

ORDER STAYING MANDATE—Filed March 2, 1976

ORDERED, That motion to stay mandate herein pending application to the Supreme Court for writ of certiorari is hereby granted and the mandate is stayed for thirty days from this date; provided that, if within such thirty days, the applicant shall file with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition, record, and brief have been filed, the stay shall continue until the final disposition of the case by the Supreme Court. Unless this condition is complied with within such thirty days or any extension thereof made by the Court or any judge thereof, or if the condition is complied with, then upon the filing of copy of an order denying the writ applied for, the mandate shall issue.

ENTERED BY ORDER OF THE COURT
/s/ John P. Hehman, Clerk

BLEED THROUGH

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1319

FRANK E. HADDAD, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

We invite the Court's attention to the following facts which indicate that the petition for a writ of certiorari was filed out of time. The judgment of the court of appeals was entered on December 10, 1975 (Pet. App. A) and no petition for rehearing was filed. The 90-day period under 28 U.S.C. 2101(c) within which a petition for a writ of certiorari in a civil case must be filed expired on March 9, 1976, and the time for filing the petition was not extended. The petition was not filed until March 15, 1976. Since the time limit specified by 28 U.S.C. 2101(c) is

jurisdictional, the petition for a writ of certiorari should be denied.[1]

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

APRIL 1976.

---

[1]On March 2, 1976, the court of appeals entered an order staying the mandate for 30 days and providing that if a petition for a writ of certiorari was filed within that 30-day period, the stay would continue in effect until this Court disposed of the case (Pet. App. E). Contrary to petitioner's apparent belief that his petition is timely because filed within that 30-day period (Pet. 2), the court of appeals' order did not and could not extend the time for filing the petition.

DOJ-1976-04

SUPREME COURT, U. S.
FILED
MAY 7 1976
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-1319

FRANK E. HADDAD, JR. - - - Petitioner

VERSUS

UNITED STATES OF AMERICA - - Respondent

On Petition For Writ of Certiorari to the United States Court of Appeals For the Sixth Circuit

---

PETITIONER'S RESPONSE TO MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

FRANK A. LOGAN
504 Kentucky Home Life Building
Louisville, Kentucky 40202
Counsel for Petitioner

WESTERFIELD-BONTE CO., 619 W. KENTUCKY—C... BOX 3291, LOUISVILLE, KY.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-1319

FRANK E. HADDAD, JR. - - - *Petitioner*

v.

UNITED STATES OF AMERICA - - *Respondent*

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITIONER'S RESPONSE TO MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The Solicitor General correctly states in a Memorandum for the United States in Opposition that 28 U.S.C. 2101(c) requires a petition for a writ of certiorari in a civil case to be filed within ninety days, unless extended.

However, the Petitioner invites the Court's attention to 28 U.S.C. 2101(f) which modifies the effect of subsection (c). 28 U.S.C. 2101(f) states that,

> "In any case in which the final judgment or decree of any court is subject to review by the Supreme Court on writ of certiorari, the execution and enforcement of such judgment or decree may be stayed for a reasonable time to enable the party aggrieved to obtain a writ of certiorari from the Supreme Court. The stay may be granted by a judge of the court rendering the judgment or decree. . . ."

In the instant case, the final judgment or decree of the Sixth Circuit is subject to review by the Supreme Court on writ of certiorari. The execution and enforcement of that judgment or decree has been stayed by the Sixth Circuit for thirty days from March 2, 1976 to enable Petitioner to obtain a writ of certiorari from the Supreme Court (Pet. App. E).

Petitioner's petition was filed within the thirty day period and is, therefore, filed in accordance with 28 U.S.C. 2101(c) as modified by 28 U.S.C. 2101(f).

Also, because of the important implications for criminal practice and procedure presented by the Sixth Amendment issue raised in this petition, it may be that the Court will observe that timeliness, under this Court's rules in a criminal case [Rule 22(2)], is not jurisdictional, and does not bar this Court's exercise of discretion to consider this case. *Taglianetti* v. *United States,* 394 U. S. 316, 89 S. Ct. 1099, 22 L. Ed. 2d 302, 304, n. 1 (1969); *Durham* v. *United States,* 401 U. S. 481, 91 S. Ct. 858, 28 L. Ed. 2d 200, 202 (1971).

Because the petition has been filed within the time limit of 28 U.S.C. 2101(c) as modified by 28 U.S.C.

2101(f), and because this petition presents a Sixth Amendment question with important implications for criminal practice and procedure such that timeliness would not be jurisdictional under this Court's Rule 22(2), the petition for a writ of certiorari should be granted.

Respectfully submitted,

FRANK A. LOGAN
504 Kentucky Home Life Building
Louisville, Kentucky 40202

Counsel for Petitioner

May 1976